APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 80-5572

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

G. CECIL HARTLEY, TRAVIS DELL
and TREASURE ISLE, INC.,
Defendants-Appellants.

Appeal from the United States District Court for the
MIDDLE DISTRICT OF FLORIDA

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC
(Opinion June 17, 1982, 11 Cir., 198____, _____F.2d _____).

(SEP 8 1982)

Before GODBOLD, Chief Judge; HILL and FAY, Circuit Judges.

PER CURIAM

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs. Case No. 79-69-Cr-T-GC

G. CECIL HARTLEY, TRAVIS DELL,
ROBERT L. (PAT) PATERSON, and
TREASURE ISLE, INC.

ORDER

I

The Defendants in this case are charged in a 33 count Indictment, Count I of which charges conspiracy to defraud the United States of America in connection with procurement by the Department of Defense of frozen breaded shrimp from the Defendant Treasure Isle, Inc. Paragraph 12 of the Indictment states:

> It was part of said conspiracy that the Defendants would supply and cause to be supplied in connection with military procurement contracts with the Department of Defense, shrimp that did not conform to contract requirements, to wit:
> (a) Shrimp that were smaller than represented;
> (b) Shrimp that were improperly peeled and deveined;
> (c) Shrimp that were intentionally breaded so that the breading exceeded 50% of weight;
> (d) Shrimp that originated from a foreign source;
> (e) Shrimp that were otherwise unacceptable.

Other portions of the Indictment, which was returned on August 8, 1979, charge violations of the mail fraud statute, 18 U.S C. § 1341. The mailings alleged as an element of these offenses consist of invoices mailed from Defendant Treasure Isle to the United States Government, specifically, the Defense Personnel Support Center, and Treasury checks mailed to Defendant Treasure Isle from the United States Government. The Indictment also charges interstate transportation of property taken by fraud, 18 U.S.C. § 2314. The property involved in those counts are various Treasury checks mailed from the United States Government to the Defendant Treasure Isle. The Indictment also charges the Defendants with racketeering in violation of 18 U.S.C. § 1961 *et seq.*

Throughout the period of time covered by the Indictment, that is from approximately 1970 through July, 1978, the United States Government purchased large amounts of frozen breaded shrimp from the Defendant Treasure Isle under various contracts entered into by the United States and Treasure Isle. The United States Government continued to purchase shrimp from Treasure Isle until approximately the date that this Indictment was returned. Only a relatively small amount of the shrimp purchased by the Government from Treasure Isle is still in existence and available for inspection and testing by the Defendants in this case. Defendant G. Cecil Hartley filed a Motion in Limine, to Dismiss and to Suppress and a Supplemental Motion in Limine, to Dismiss and to Suppress which concern nonpreservation of shrimp by the Government and mishandling of shrimp which was preserved. The Motions, which have been joined in by all Defendants, contend that the Government has violated these Defendants' right to due process under the Fifth Amendment to the Constitution. The Motions assert that the Defendants were pre-

judiced by intentional pre-indictment delay, the prejudice being the unavailability of frozen breaded shrimp purchased from Treasure Isle by the Government for defense inspection and testing. It is further alleged that the continued consumption of shrimp by the United States Government during this period constitutes evidence of a purposeful and oppressive scheme to suppress and destroy material evidence in violation of the constitutional rights of the Defendants in this case. The Motions request dismissal of the Indictment, or, in the alternative, suppression of certain evidence relating to the shrimp which was tested. At a hearing held on the Motions immediately prior to commencement of the trial in this case, the Court announced that it would take the issue of dismissal of the Indictment on the ground of pre-indictment delay under advisement. However, the Motion to Suppress evidence based on Government destruction and mishandling of the shrimp was denied for the reasons set forth below.

As mentioned above, shrimp was purchased and consumed by the Department of Defense for consumption by military personnel throughout the period covered by the Indictment. During the latter years of this period the United States, through the Defense Investigative Service, was investigating certain alleged improprieties in connection with the in-plant inspection of frozen breaded shrimp which was being processed for sale to the Government. The investigation began in the latter part of 1976 but was closed in December of 1976. The investigation was reopened in the Spring of 1977, and its early stages was concerned with allegations of bribery of military inspectors. In December of 1977 the investigation began to focus on suspected outside subversion of the inspection process. (The details of this investigation and the results thereof were dealt with in the Court's Order on the Motion to Sup-

press dated April 2, 1980.) In January 1978, military inspectors at the Treasure Isle plant attempted to verify their suspicion that the inspection process was being subverted by employees of Treasure Isle. Certain steps were taken toward this end in connection with production lot nos. F6968 and F7008. After the inspectors' suspicions were verified to their satisfaction, the inspectors notified their superiors as to what they had found. Thereafter the shrimp which was produced under these two production lot numbers were shipped to various destinations pursuant to three separate Government contracts. The last four digits of those contracts were 5168, 5150, and 5153. Orders were given to place the shrimp from these lot numbers on hold for later testing. On two occasions during the early part of 1978 shrimp from these lot numbers were tested for compliance to Government specifications. A substantial portion of these lots were preserved and have been made available to the Defendants for testing. However due to subsequent thawing and refreezing, and normal deterioration, the shrimp from these two lots cannot be tested for some of the characteristics which are pertinent to this case, such as breading percentage and count per pound. All other shrimp produced by Treasure Isle and sold to the United States Government has been consumed, or in the words of the Defendants in this case, systematically destroyed.

In May, 1979, Defendant Hartley first learned that he was the object of a criminal investigation relating to the activities alleged in the Indictment, and, through his attorney contacted the prosecutor in this case. Defendant Hartley requested that recently produced shrimp be located and preserved to the extent that it could be at that time. *See* Hartley Exhibit No. 5. This request was refused by the Government. *See Hartley Exhibit No. 5A.* Prior to

the return of the Indictment, Defendant Hartley and his attorney did view, inspect, and test shrimp from the lots that had been put on hold by the Government at Norfolk, Virginia. The testing procedure which was mandated by the Government prosecutor at that time, however, was unacceptable to the Defendants. Thus when other shrimp was to be made available to them for testing at San Antonio, Texas, prior to the Indictment, Defendant Hartley refused the Government's offer.

II

In *Brady v. Maryland,* 373 U.S. 83 (1963) the Supreme Court established the basic principle that the prosecution has a duty to disclose evidence which is favorable to an accused upon request. Failure to do so may constitute a violation of the right to due process where the evidence is material either to guilt or to punishment irrespective of good faith or bad faith of the prosecution. *Id.* at 87. *See also Calley v. Callaway,* 519 F.2d 184, 221 (5th Cir. 1975) (*en banc*), *cert. denied,* 425 U.S. 911 (1976); *United States v. Gaston,* 608 F.2d 607 (5th Cir. 1979). A related problem arises when evidence in a criminal trial has been destroyed, or is otherwise unavailable due to conduct attributable to the prosecuting authorities. It has been held in this Circuit that as a matter of the fundamental fairness which is guaranteed by the due process clause of the fifth amendment a criminal defendant is entitled to access to relative and material evidence which is necessary for him to prepare his defense. *See Barnard v. Henderson,* 514 F.2d 744 (5th Cir. 1975). "Whether a Defendant has been deprived of this right of due process will depend upon the materiality of the evidence, the likelihood of mistaken interpretation of it by Government witnesses or the jury, and the reasons for its nonavailability to the defense."

United States v. Herndon, 536 F.2d 1027, 1029 (5th Cir. 1976).[1] If the evidence is material and there is a likelihood of mistaken interpretation of it by Government witnesses or the jury, the Court must determine whether the evidence was "critical" to the Defendant's ability to present his case. "Critical evidence" for the purpose of this inquiry, is evidence that, when developed by skilled counsel and experts, could induce a reasonable doubt in the minds of enough jurors to avoid a conviction. *See White v. Maggio,* 556 F.2d 1352, 1357-1358 (5th Cir. 1977).

The Court must agree with the Defendants in this case that the missing shrimp is both material and subject to varying expert opinion. While the consumption of the shrimp was "intentional", there is no evidence that there was an improper governmental motive in this case. The advisability of the continuing purchases of shrimp from Treasure Isle after January, 1978, may be questioned. However, once that shrimp was purchased it was not unreasonable for it to be consumed. The Government has stated no intention of introducing any results of tests performed on shrimp that was later consumed. While the Defendants are denied any potential benefits from tests which they may have performed, so to is the Government deprived of tests results which may have proven

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[1]In *Armstrong v. Collier,* 536 F.2d 72, 78 (5th Cir. 1976) the Court enunciated, without specifically adopting, the standard devised in the case of *United States v. Bryant,* 142 U.S. App.D.C. 132, 439 F.2d 642 (1971); in a lost evidence case the determination of whether the indictment should be dismissed is based on three factors: The degree of negligence or bad faith on the part of the Government, the importance of the evidence lost, and the evidence of guilt adduced at trial.

The First Circuit has devised a similar three pronged examination: first, was the evidence material to the question of guilt or the degree of punishment; second, was the Defendant prejudiced by its destruction; and third, was the Government acting in good faith when it destroyed the evidence. *United States v. Picariello,* 568 F.2d 222 (1st Cir. 1978).

beneficial to their case. With regard to the shrimp that was preserved and allegedly mishandled by the Government, that being the shrimp contained in lots F6968 and F7008, the Court concludes that the Defendants have failed to sufficiently establish that there was intentional or even negligent conduct on the part of the Government agents which has caused the shrimp to be untestable for certain pertinent characteristics. Indeed the evidence at the hearing established that the mere passage of time would, to some extent, change the character and makeup of frozen breaded shrimp such that tests performed on it would be unreliable.

Thus, for the reasons set forth above the Court concludes that the consumption of shrimp purchased by the Government from Defendant Treasure Isle and the untestability of the shrimp that was preserved will not deprive these Defendants of a fundamentally fair trial. As stated by the Supreme Court, "Apart from trials conducted in violation of expressed constitutional mandates, a constitutionally unfair trial takes place only where the barriers and safeguards are so relaxed or fogotten that the proceeding is more a spectacle or trial by ordeal than a disciplined contest." *United States v. Augenblick,* 393 U.S. 348, 356 (1969) *(citations omitted).*

III

The Supreme Court in *United States v. Lovasco,* 431 U.S. 738 (1977) established that allegations of unconstitutional pre-indictment delay are to be judged against the standards of due process. In order to prevail on this ground a Defendant must show (1) substantial prejudice which resulted from the delay, and (2) that the delay was an intentional measure to gain a tactical advantage over the Defendant, or stated another way, that the prosecution

acted so as to violate "the fundamental conceptions of justice or the community's sense of fair play decency." *Id.* at 790, *quoting Rochin v. California,* 342 U.S. 165, 173 (1952); *United States v. Parker,* 586 F.2d 422 (5th Cir. 1978). In attempting to establish substantial prejudice the Defendant may not rest on general or speculative allegations of prejudice. *See United States v. Duke,* 527 F.2d 386 (5th Cir.), *cert. denied,* 426 U.S. 952 (1976); *United States v. McGough,* 510 F.2d 598 (5th Cir. 1975). In addition, prosecution of a Defendant following investigative delay does not deprive him of due process despite the fact that his defense may have been somewhat prejudiced by the lapse of time. *United States v. Lovasco, supra,* at 796. Thus, if the Court determines that there has been some actual prejudice to the Defendants caused by the delay in bringing the Indictment, the Court must carefully evaluate the reasons offered by the Government to justify the delay to determine whether it was necessary for a legitimate prosecutorial purpose.

The period of delay which the Defendants complain of began in January, 1978, at which time the Government had gathered certain information concerning sample switching and other improprieties concerning the inspection of shrimp in the Treasure Isle plant. The details of the Government's knowledge at this time were recounted in the Order on the Motion to Suppress referred to above. The Indictment in this case was returned in August of 1979. Thus, according to the Defendants there was a period of nineteen months during which the prosecution delayed presenting facts known at that time to a Grand Jury for purposes of indicting these Defendants.

While assuming, without deciding, that the Defendants were substantially prejudiced by this period of delay, the Court finds no evidence of any effort by the prosecution

to gain a tactical advantage over the Defendants. The information that the Government was privy to in January of 1978 may have been sufficient to charge someone with something. The Government, however, chose to continue the investigation of activities at Treasure Isle which led to the present Indictment. As the trial of this case has clearly demonstrated the charges and the proof which has been presented to support those charges are complex. No one's interest would have been well served had the prosecution sought to initiate this case as soon as they were legally entitled to. *See United States v. Marion,* 404 U.S. 307, 325 (1971); *United States v. Lavasco, supra,* at 792-796.

In sum, the Court finds that the due process rights of these Defendants have not been violated by the lapse of time between the period of time covered by the Indictment and the time of the return of the Indictment. Accordingly, the Motion to Dismiss based on this ground is DENIED.

DONE AND ORDERED in Chambers in Tampa, Florida, this 11th day of June, 1980.

George L. Carr
United States District Judge